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# The FTC's Competition Policy after the Intel Settlement

Justin Whitesides\*

## INTRODUCTION

Judge Posner said the following about Section 5 of the Federal Trade Commission Act (Section 5): "It used to be thought that 'unfair methods of competition' swept further than practices forbidden by the Sherman and Clayton Acts, and you find this point repeated occasionally even today, but it is no longer tenable."<sup>1</sup> The FTC disagrees. According to Commissioner J. Thomas Rosch, "[A]s a matter of law, Section 5 is broader in scope and deeper in reach than Section 2 of the Sherman Act."<sup>2</sup> Chairman Joe Leibowitz has echoed Commissioner Rosch's expansive reading of Section 5,<sup>3</sup> and recent FTC actions indicate that the agency is using the provision to expand its ability to challenge "anticompetitive" conduct.<sup>4</sup>

In August 2010, Intel settled an FTC complaint based solely on Section 5 of the FTC Act.<sup>5</sup> The FTC alleged that Intel had "engaged in a course of conduct that, considered individually or collectively, violate[d]" Section 5.<sup>6</sup> The FTC contended that Intel's behavior

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1. Richard A. Posner, *The Federal Trade Commission: A Retrospective*, 72 ANTITRUST L.J. 761, 766 (2005). Judge Posner does not think all FTC actions are misguided; he praises its "genuine accomplishments" in *FTC v. Staples, Inc.*, 970 F. Supp 1066 (D.D.C. 1997), and the first *Intel* consent decree, among others, in the same article. *Id.* at 765.

2. J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Welcoming Remarks, FTC Section 5 Workshop 1 (Oct. 17, 2008), [www.ftc.gov/bc/workshops/section5/docs/trosch.pdf](http://www.ftc.gov/bc/workshops/section5/docs/trosch.pdf).

3. See, e.g., Jon Leibowitz, Comm'r, Fed. Trade Comm'n, "Tales from the Crypt" Episodes '08 and '09: The Return of Section 5 ("Unfair Methods of Competition in Commerce Hereby Declared Unlawful"), Section 5 Workshop 5 (Oct. 17, 2008), <http://www.ftc.gov/speeches/leibowitz/081017section5.pdf> ("[E]veryone can agree (I've decided) that the FTC Act goes beyond the metes and bounds of the Sherman Act."); Jon Leibowitz, Chairman, Fed. Trade Comm'n, 5 (Sept. 24, 2009), <http://www.ftc.gov/speeches/leibowitz/090924fordhamspeech.pdf>.

4. See, e.g., Negotiated Data Solutions, L.L.C., FTC Docket No. C-4234 (Sept. 23, 2008) (Decision and Order), <http://www.ftc.gov/os/caselist/0510094/080923ndsdo.pdf>; Intel Corp., FTC Docket No. 9341 (Oct. 29, 2010) (Decision and Order), <http://www.ftc.gov/os/adjpro/d9341/101102inteldo.pdf>.

5. See Intel Corp., FTC Docket No. 9341 (July 28, 2010) (Agreement Containing Consent Order), <http://www.ftc.gov/os/adjpro/d9341/100804intelagree.pdf> [hereinafter Intel Agreement].

6. Intel Corp., FTC Docket No. 9341 at 1 (Dec. 16, 2009) (Complaint), <http://www.ftc.gov/os/adjpro/d9341/091216intelcmpt.pdf> [hereinafter Intel Complaint].

amounted to “unfair methods of competition” and “unfair or deceptive acts or practices.”<sup>7</sup> The details of Intel’s alleged course of conduct and the legal implications of the rule the FTC used are the subject of this paper.

Briefly stated, the FTC accused Intel of four violations of Section 5.<sup>8</sup> First was the chipmaker’s exclusive dealing arrangements with computer manufacturers.<sup>9</sup> Second was that the company designed software to slow the performance of rival central processing units (CPUs).<sup>10</sup> Third was its conduct regarding rival graphics processing units (GPUs): it denied interoperability between rival GPUs and Intel CPUs, and also, it bundled Intel CPUs and GPUs as part of a predatory pricing scheme.<sup>11</sup> Fourth, the company allegedly delayed access to some of the industry standards it controls.<sup>12</sup>

This Article examines the implications of the FTC’s use of Section 5 in the Intel settlement, providing businesses wary of future FTC interventions with a guide to the types of conduct likely to draw its attention. In exploring the uncertain nature of Section 5, the paper seeks to articulate a framework within which to contain the provision. Part I briefly lays out Section 5’s relationship with the Sherman Act and recounts the historical enforcement of the former provision from its inception up to the 2010 Intel settlement. Part II details Intel’s conduct through the lens of the objections levied against it by the FTC. Part III articulates the stated and implied rules the Commission applied. Part IV analyzes the rule and proposes a legal standard that can confine Section 5 enforcement. A brief conclusion follows in Part V.

## I. BACKGROUND

Section 5 of the FTC Act provides: “Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.”<sup>13</sup> Commentators agree that the 1914 Congress enacted Section 5 to reach more

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7. 15 U.S.C. § 45(a)(1) (2006); *see also* Intel Complaint, *supra* note 6, at 17–18.

8. Intel does not stipulate that these facts are true: “This Consent Agreement is for settlement purposes only and does not constitute an admission by [Intel] that the law has been violated as alleged in the Complaint, or that the facts as alleged in the Complaint, other than jurisdictional facts, are true.” Intel Agreement, *supra* note 5, ¶ 6.

9. Intel Corp., Analysis of Proposed Consent Order to Aid Public Comment, 75 Fed. Reg. 48,338, 48,340 to 41 (Fed. Trade Comm’n Aug. 10, 2010) [hereinafter Intel Analysis].

10. *Id.* at 48,341.

11. *Id.* at 48,341 to 42.

12. Intel Complaint, *supra* note 6, ¶ 92.

13. 15 U.S.C. § 45(a)(1).

conduct than the Sherman Act does.<sup>14</sup> However, Supreme Court decisions beginning in the 1940s and ending in the late 1970s enlarged the Sherman Act's reach, which effectively engulfed Section 5.<sup>15</sup> Thus, the FTC usually tries antitrust cases under Section 5 using Sherman Act theories.<sup>16</sup>

But since the late 1970s, the Supreme Court has tightened the standards of Sherman Act violations.<sup>17</sup> Procedurally, *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*<sup>18</sup> and *Bell Atlantic Corp. v. Twombly*<sup>19</sup> significantly limited the ability of private plaintiffs to get to trial.<sup>20</sup> Other decisions, such as *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*<sup>21</sup> and *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*,<sup>22</sup> have limited the Sherman Act's reach with respect to single-firm conduct. *Brooke Group* set a test that "unquestionably tilts the balance toward the defendant in predatory pricing suits."<sup>23</sup> *Trinko* placed the Supreme Court's imprimatur on monopoly power because it "attracts 'business acumen' in the first place [and] it induces risk taking that produces innovation and economic growth."<sup>24</sup>

With the Sherman Act thus restricted, Section 5 has become more attractive to the FTC as it seeks to challenge conduct that is increasingly out of reach. The history of Section 5 is relatively brief and provides important limits to its power. *FTC v. Motion Picture Advertising Service Co.* states, "The 'unfair methods of competition[,] which are condemned by § 5(a) of the Act, are not confined to those that were

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14. See, e.g., Posner, *supra* note 1, at 767; Herbert Hovenkamp, *The Federal Trade Commission and the Sherman Act*, 62 FLA. L. REV. 871, 873 (2010); William Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929, 930–33 (2010).

15. See Kovacic & Winerman, *supra* note 14, at 934–35.

16. See *FTC v. Cement Inst.*, 333 U.S. 683, 694–695 (1948).

17. See Kovacic & Winerman, *supra* note 14, at 937.

18. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) ("[I]f the claim is one that simply makes no economic sense—respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary.").

19. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (raising pleading standards from "no set of facts" test of *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957) to a new "plausible on its face" standard).

20. See D. Daniel Sokol, *Antitrust, Institutions, and Merger Control*, 17 GEO. MASON L. REV. 1055, 1065–66 (2010).

21. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

22. *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004).

23. Alan Devlin & Michael Jacobs, *Antitrust Error*, 52 WM. & MARY L. REV. 75, 121 (2010). *Brooke Group* requires plaintiffs to prove (1) pricing below an appropriate measure of its rival's costs, and (2) a dangerous probability that the rival will be able to recoup its investment in below-cost prices. 509 U.S. at 222–23.

24. *Trinko*, 540 U.S. at 407 (quoting *U.S. v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966)).

illegal at common law or that were condemned by the Sherman Act."<sup>25</sup> *FTC v. Sperry & Hutchinson Co.* states that the Commission has the power under Section 5 to "define and proscribe an unfair competitive practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws."<sup>26</sup>

Since *Sperry & Hutchinson*, courts have not defined "unfair methods of competition" except by rejecting the FTC's theories when it attempts to reach farther than the Sherman Act allows.<sup>27</sup> Thus, the only certainties under Section 5 are what it does not reach. These answers can be found in *Boise Cascade v. FTC*, *Official Airline Guides v. FTC*, *E.I. DuPont de Nemours & Co. v. FTC (Ethyl)*, and *FTC v. Abbott Laboratories*.<sup>28</sup> In *Boise Cascade* (1980), the Ninth Circuit addressed the FTC's contention that oligopolists' parallel pricing, "although not yet having grown into Sherman Act dimensions[,] would[ ] mostly likely do so if left unrestrained."<sup>29</sup> *Boise Cascade* rejected the FTC's argument and held that "a mere showing of parallel action will not establish a section 5 violation."<sup>30</sup>

In *Official Airlines Guides* (1980), the Second Circuit addressed the FTC's claim that it should have the power to stop a monopolist that refuses to deal with others in a way that arbitrarily harms competition in a second market.<sup>31</sup> In rejecting this theory, the court reasoned that "enforcement of the FTC's order here would give the FTC too much power to substitute its own business judgment for that of the monopolist in any decision that arguably affects competition in another industry."<sup>32</sup>

In *Ethyl* (1984), the Second Circuit addressed the FTC's argument that it could stop oligopolists from "facilitating" parallel price increases.<sup>33</sup> The three facilitating practices were advance notice of price increases, most favored nation clauses "under which the seller promised that no customer would be charged a higher price than other customers[.]" and uniform delivered price that included all costs up to delivery.<sup>34</sup> The court disagreed with the FTC: "As the Commission

25. *FTC v. Motion Picture Adver. Serv. Co.*, 344 U.S. 392, 394 (1953).

26. *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239 (1972).

27. Kovacic & Winerman, *supra* note 14, at 942.

28. *Boise Cascade Corp. v. FTC*, 637 F.2d 573, 581-82 (9th Cir. 1980); *Official Airline Guides, Inc. v. FTC*, 630 F.2d 920 (2d Cir. 1980); *E.I. DuPont de Nemours & Co. (Ethyl) v. FTC*, 729 F.2d 128 (2d Cir. 1984); *FTC v. Abbott Labs.*, 853 F. Supp. 526 (D.D.C. 1994).

29. *Boise Cascade*, 637 F.2d at 581 (quoting *FTC v. Cement Inst.*, 333 U.S. 683, 708 (1948)).

30. *Id.* at 577.

31. *Official Airlines Guides*, 630 F.2d at 926.

32. *Id.* at 927.

33. *See Ethyl*, 729 F.2d at 130.

34. *Id.* at 130.

moves away from attacking conduct that is either a violation of the antitrust laws or collusive, coercive, predatory, restrictive or deceitful, and seeks to break new ground by enjoining otherwise legitimate practices, the closer must be our scrutiny upon judicial review.”<sup>35</sup> The Second Circuit then formulated its constraints for Section 5 enforcement in an oligopolistic industry: “[A] minimum standard demands that, absent a tacit agreement, at least some indicia of oppressiveness must exist such as (1) evidence of anticompetitive intent or purpose . . . or (2) the absence of an independent legitimate business reason for its conduct.”<sup>36</sup>

In *Abbott* (1994), the District of Columbia Circuit applied *Ethyl*’s Section 5 test to an FTC action against a pharmaceutical company’s noncompetitive bid.<sup>37</sup> The *Ethyl* standard itself did not fail; instead, the conduct failed the test: the pharmaceutical company did not manifest anticompetitive intent and had a legitimate business justification for its noncompetitive bid.<sup>38</sup> The bid was its optimal competitive strategy given the surrounding circumstances.<sup>39</sup> Thus, the *Abbott* court held for the pharmaceutical company.<sup>40</sup>

*Abbott* is the last appellate review of the FTC’s Section 5 authority to stop conduct that is not quite a Sherman Act violation.<sup>41</sup> Therefore, on appellate review, at least in the D.C. and Second Circuits, the *Ethyl* standard will apply when a firm challenges the FTC’s Section 5 authority to condemn oligopolistic conduct that does not violate the Sherman Act.

But this does not settle the question of Section 5’s limits. Indeed, the FTC itself is searching for a workable standard as it seeks to increase intervention. In October of 2008, the FTC held a workshop to “examine three topics: (1) the history of Section 5 . . . ; (2) the range of possible interpretations of Section 5; and (3) examples of business conduct that may be unfair methods of competition addressable by Section 5.”<sup>42</sup> Additionally, the FTC has recently used Section 5 to stop “anticompetitive” conduct that was arguably legal under the

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35. *Id.* at 137.

36. *Id.* at 139.

37. *FTC v. Abbott Labs.*, 853 F. Supp. 526, 533 (D.D.C. 1994).

38. *Id.* at 535–37.

39. *Id.* at 534–35.

40. *Id.* at 536–37.

41. See Kovacic & Winerman, *supra* note 14, at 941–42.

42. Public Workshop Concerning the Prohibition of Unfair Methods of Competition in Section 5 of the Federal Trade Commission Act, 73 Fed. Reg. 50,818, 50,819 (Fed. Trade Comm’n Aug. 28, 2008). Comprehensive information on the workshop is available at <http://www.ftc.gov/bc/workshops/section5/index.shtml>.

Sherman Act. Those two settlements were with Negotiated Data Solutions (N-Data) in 2008<sup>43</sup> and Intel in 2010.<sup>44</sup>

Intel's conduct was summarized above and will be discussed at length in the following materials. N-Data's behavior involved licensing agreements for patents relating to an industry standard for Ethernet connections.<sup>45</sup> In a series of assignments, N-Data obtained patent rights to technology that had won an industry standard for Fast Ethernet connections.<sup>46</sup> The company that developed the technology, National, competed with others to win the industry standard.<sup>47</sup> In this competition, National promised the industry that "if [its] technology were chosen, National would license [its technology] to any requesting party for a one-time fee of \$1,000."<sup>48</sup> Years later, when N-Data obtained rights to the patent, it refused to honor the \$1,000 license fee to new companies and it threatened legal actions against companies refusing to pay N-Data royalties "far in excess" of the original price.<sup>49</sup>

The FTC challenged the above conduct as (1) an unfair method of competition and (2) an unfair act or practice.<sup>50</sup> Within the first prong, the FTC used two limiting principles.<sup>51</sup> First, it used the *Ethyl* test to analyze the "nature of the conduct."<sup>52</sup> The FTC found that N-Data's "patent hold-up [was] inherently 'coercive' and 'oppressive' with respect to firms that are . . . locked into a standard."<sup>53</sup> Second, the FTC found that the conduct had an adverse impact on competition.<sup>54</sup> The adverse impact it found was that N-Data raised prices and undermined the standard-setting process.<sup>55</sup> Because the standard-setting

43. See Negotiated Data Solutions L.L.C., FTC Docket No. C-4234 (Sept. 22, 2008) (Decision and Order), <http://www.ftc.gov/os/caselist/0510094/080923ndsdo.pdf>.

44. See Intel Agreement, *supra* note 5.

45. See Negotiated Data Solutions LLC, Analysis of Proposed Consent Order to Aid Public Comment, 73 Fed. Reg. 5846-01, 5847 (Fed. Trade Comm'n Jan. 30, 2008) [hereinafter N-Data Analysis]. N-Data does not stipulate that these facts are true: "The Agreement has been entered into for settlement purposes only, and does not constitute an admission by N-Data that the law has been violated as alleged or that the facts alleged, other than jurisdictional facts, are true." *Id.*

46. See *id.* at 5847-48.

47. See *id.* at 5847.

48. *Id.*

49. *Id.*

50. See N-Data Analysis, *supra* note 45, at 5847.

51. See *id.* at 5849.

52. *Id.*

53. See *id.* (quoting E.I. DuPont de Nemours & Co. (*Ethyl*) v. FTC, 729 F.2d 128, 139-40 (2d Cir. 1984)).

54. See *id.*

55. See N-Data Analysis, *supra* note 45, at 5849.

process is procompetitive, the FTC reasoned, N-Data's conduct undermining it was anticompetitive.<sup>56</sup>

The second prong of the FTC's Section 5 theory, unfair acts or practices, is limited by statute: "The Commission shall have no authority . . . unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."<sup>57</sup> The FTC found injury to consumers in "increased prices due to the higher royalties."<sup>58</sup> It found that consumers could not have avoided the price increases because "the industry could not have reasonably anticipated [it] before the market wide adoption of the standard and . . . consumers had no chance of avoiding [it] due to network effects and lock-in."<sup>59</sup> Finally, instead of analyzing any possible procompetitive justifications, the FTC stated simply that N-Data's price increases "have no apparent 'countervailing benefit'—to those upon whom demands have been made, ultimate consumers, or to competition—so the [third] requirement is also met."<sup>60</sup> The FTC's treatment of this case has been praised and criticized,<sup>61</sup> and as William Kovacic noted, "*N-Data* is interesting, but the concept applied there becomes truly significant only if and when it ultimately prevails in a contested matter and survives review in the appellate process."<sup>62</sup>

To summarize the state of Section 5 enforcement leading up to the Intel settlement, one can be reasonably certain of five things. First, *Boise Cascade* suggests that a court will not likely find for the FTC if it challenges an oligopolistic parallel price increase when no other indi-

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56. *See id.*

57. *Id.* (quoting 15 U.S.C. § 45(n)).

58. *Id.* at 5850.

59. *Id.*

60. N-Data Analysis, *supra* note 45. (quoting *Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1364 (11th Cir. 1988)).

61. For praise, see Robert H. Lande, *Revitalizing Section 5 of the FTC Act Using "Consumer Choice" Analysis*, 8-FEB ANTITRUST SOURCE 1, 4 (2009) ("The FTC's action in the . . . *N-Data* [ ] case should be applauded, and the Commission commended for condemning the opportunistic behavior at issue and affirming that conduct can be an antitrust violation of the FTC Act even if it does not violate the Sherman Act."). For criticism, see Jonathan Gleklen, *The Emerging Antitrust Philosophy of FTC Commissioner Rosch*, 23 ANTITRUST 46, 49 (2009) ("How was N-Data's conduct any more 'oppressive' or 'coercive' than any other breach of contract by a firm? . . . And while it is helpful to know that Commissioner Rosch believes that there must be an adverse effect on competition, it is far from clear where he believes that such an effect could be found in the *Negotiated Data* case.").

62. Kovacic & Winerman, *supra* note 14, at 941.



cation of collusion exists.<sup>63</sup> Second, *Official Airlines Guides* shows that a court will not likely find for the FTC if it challenges a monopolist's refusal to deal with another firm, even if there is harm to a second market.<sup>64</sup> Third, *Ethyl* teaches that a court will not likely find for the FTC if it challenges an oligopolist's facilitating practices that might signal parallel price increases.<sup>65</sup> Fourth, *Abbott* shows that *Ethyl* provides a workable standard of review for appellate courts. That standard is that the FTC must show "some indicia of oppressiveness . . . such as (1) evidence of anticompetitive intent or purpose . . . or (2) the absence of an independent legitimate business reason for its conduct."<sup>66</sup> Finally, *N-Data* shows that the FTC is likely to use its Section 5 authority to challenge practices that harm the standard-setting process.<sup>67</sup>

The 2010 Intel settlement, however, does not provide so many answers. The FTC's complaint follows a "course of conduct" theory<sup>68</sup> that was sufficiently unbounded to have led Commissioner Rosch to concur and dissent from the complaint.<sup>69</sup> Chairman Leibowitz, on the other hand, announced, "Everyone, including Intel, gets a greater degree of certainty about the rules of the road going forward, which allows all the companies in this dynamic industry to move ahead and build better, more innovative products."<sup>70</sup> But since the legal rules encompassing this conduct are not clear, one must look to the conduct itself to find the "certainty" Chairman Leibowitz promotes. Clearly articulating such conduct from the point of view of the FTC is one goal of this Article. The second is to articulate a working framework within which to contain the provision.

Finally, before beginning an analysis of the 2010 Intel settlement, it is helpful to review how this case fits into the context of the past and pending antitrust actions against Intel. In May 2009, the European

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63. See *Boise Cascade Corp. v. FTC*, 637 F.2d 573, 581 (9th Cir. 1980); see also *supra* notes 29–30 and accompanying text.

64. See *Official Airlines Guides, Inc. v. FTC*, 630 F.2d 920, 927 (2d Cir. 1980); see also *supra* notes 31–32 and accompanying text.

65. See *E.I. DuPont de Nemours & Co. (Ethyl) v. FTC*, 729 F.2d 128, 128 (2d Cir. 1984); see also *supra* notes 33–36 and accompanying text.

66. *Id.* at 139.

67. See *N-Data Analysis*, *supra* note 45, at 5847–50; see also *supra* notes 45–62 and accompanying text.

68. Intel Complaint, *supra* note 6, at 1–2.

69. Intel Corp., FTC Docket No. 9341 (Dec. 16, 2009) (Concurring and Dissenting Statement of Commissioner J. Thomas Rosch), <http://www.ftc.gov/os/adjpro/d9341/091216intelstatement.pdf>.

70. Jon Leibowitz, Chairman, Fed. Trade Comm'n, Press Release, FTC Settles Charges of Anticompetitive Conduct Against Intel (Aug. 4, 2010), <http://www.ftc.gov/opa/2010/08/intel.shtm>.

Commission levied a \$1.45 billion fine against Intel for its discount, rebate, and loyalty practices.<sup>71</sup> Intel appealed to the Court of First Instance in July 2009.<sup>72</sup> Then, on November 3, 2009, New York's Attorney General filed an antitrust suit against Intel, challenging its rebate, discount, and loyalty practices.<sup>73</sup> Finally, on November 11, 2009, Intel paid AMD (the rival chipmaker) \$1.25 billion to settle all their antitrust and patent disputes.<sup>74</sup> Notable in the extensive settlement agreement with AMD is that Intel agreed not to provide benefits to manufacturers in exchange for their exclusive use of Intel processors.<sup>75</sup> Therefore, by the time the FTC filed its action in December 2009, Intel was already required to pay up to \$2.7 billion and had already agreed with AMD to stop offering conditional benefits to manufacturers that exclusively deal with Intel.

## II. INTEL'S MARKET STRUCTURE, CONDUCT, AND ANTICOMPETITIVE EFFECT

The following Part details Intel's conduct through the lens of the FTC's complaint. It appears that over the course of the investigation, some of the claims were dropped, as a few of them do not appear in the Analysis of Agreement Containing Consent Order to Aid Public Comment.<sup>76</sup> Nevertheless, this Article will lay out each claim initially charged, because one purpose of the Article is to provide concrete examples of the types of conduct that catch the FTC's attention. Part A below details the FTC's perception of Intel's market structure, Part B examines the alleged conduct, and Part C identifies the supposed anticompetitive effects.

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71. See Summary of Commission Decision of 13 May 2009 relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (Case COMP/C-3/37.990 — Intel), 2009 O.J. (C 227) 13, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:227:0013:0017:EN:PDF>; see also *Punishing Intel*, ECONOMIST (May 13, 2009), <http://www.economist.com/node/13641492>.

72. Case T-286/09, Intel v Comm'n 2009 O.J. (C 220) 41 (2009), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:220:0041:0042:EN:PDF>.

73. See Complaint, N.Y. v. Intel Corp., No. 09-00827, 2009 WL 3697889 (D. Del. Nov. 4, 2009).

74. Intel and AMD Settlement Agreement, Advanced Micro Devices, Inc. v. Intel Corp., No. 05-441, (D. Del. Nov. 11, 2009), [http://download.intel.com/pressroom/legal/amd/AMD\\_settlement\\_agreement.pdf](http://download.intel.com/pressroom/legal/amd/AMD_settlement_agreement.pdf) [hereinafter Intel and AMD Settlement]; see also *Agreeing on a Pay-off*, ECONOMIST (Nov. 12, 2009), <http://www.economist.com/node/14885938>.

75. Intel and AMD Settlement, *supra* note 74, § 2.1.1.

76. Compare Intel Analysis, *supra* note 9, at 48,342 with Intel Complaint, *supra* note 6, ¶ 92 (indicating that the FTC's Analysis of Agreement does not include the final portion of the complaint regarding Intel's alleged misrepresentations relating to industry standards for USB and HDCP connections).

### A. *Intel's Market Structure*

One product market is for x86 central processing units (CPUs).<sup>77</sup> CPUs are “the brains” of computers, essential to almost every function of a computer because they process data and control devices.<sup>78</sup> Three companies make x86 CPUs capable of running Microsoft or Apple Operating Systems: Intel, AMD, and Via.<sup>79</sup> The FTC asserts that no other type of microprocessor is an adequate substitute to an x86 CPU—neither the “ARM” processors of hand-held devices nor the “Power” or “Sparc” processors used in high-end servers.<sup>80</sup>

The FTC states that Intel has a monopoly in the x86 CPU market because it has a “unit share” higher than seventy-five percent and its revenue share exceeds eighty percent.<sup>81</sup> The FTC also explains several entry barriers. First is product development, which “takes years of engineering work and several hundred million dollars in sunk capital.”<sup>82</sup> Second is the “cost and expertise to develop manufacturing capabilities,” which is “at least \$3 billion” and “another \$1 billion in each facility every two or three years.”<sup>83</sup> Third is the patents that apply to x86 CPUs.<sup>84</sup> Fourth is the “establishment of product reputation and compatibility,” which is a “multi-year project.”<sup>85</sup> Finally, the FTC alleged that “Intel’s unfair methods of competition and efforts to maintain or obtain a monopoly position in the markets” create an additional entry barrier to the x86 CPU market.<sup>86</sup>

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77. Intel Complaint, *supra* note 6, ¶ 29.

78. *Id.* ¶ 33.

79. *Id.* ¶ 35.

80. *Id.* ¶ 36.

81. *Id.* ¶ 41.

82. Intel Complaint, *supra* note 6, ¶¶ 42–43.

83. *Id.* ¶¶ 42, 44.

84. *Id.* ¶¶ 42, 45.

85. *Id.* ¶¶ 42, 46.

86. *Id.* ¶ 42. An analysis of market power alone could consume the remainder of this paper. For example, the FTC claimed that ARM technology is not a substitute. This could be challenged. ARM chips are in most netbooks, tablet PCs, and other mobile computing devices that even in 2009 were rapidly consuming market share as substitutes for PCs. *See generally* Ashlee Vance & Matt Richtel, *Light and Cheap, Netbooks Are Poised to Reshape PC Industry*, N.Y. TIMES (Apr. 2, 2009), at B2, available at [http://www.nytimes.com/2009/04/02/technology/02netbooks.html?\\_r=1#](http://www.nytimes.com/2009/04/02/technology/02netbooks.html?_r=1#). Additionally, the FTC’s alleged entry barriers include research and development costs along with reputational development that Intel and any other competitor has faced and would have to face. Inquiry into “whether costs borne by all market participants should be considered entry barriers is the subject of much debate.” *United States v. Microsoft Corp.*, 253 F.3d 34, 56 (D.C. Cir. 2001) (noting the divergence of opinion sparked by comparing *JOE S. BAIN, BARRIERS TO NEW COMPETITION: THEIR CHARACTER AND CONSEQUENCES IN MANUFACTURING INDUSTRIES* 6–7 (1956) with *GEORGE STIGLER, THE ORGANIZATION OF INDUSTRY* 67–70 (1968)).

Another product market is for graphics processing units (GPUs), which originally only processed graphics, but are evolving to process many of the computations originally reserved for a CPU.<sup>87</sup> GPUs can be integrated onto the CPU die or they can be included as a separate card in the computer system.<sup>88</sup> Intel, AMD (through its affiliate, ATI), Via, and Nvidia manufacture GPUs.<sup>89</sup> The FTC alleges that GPUs are becoming a significant threat to the dominant position of high-end x86 CPUs.<sup>90</sup> When a GPU performs more computations, it relieves the burden on the CPU, making it possible for computer manufacturers to use less expensive CPUs than they did before.<sup>91</sup>

Intel holds fifty percent of the GPU market because of its integrated chipsets, which include an Intel CPU and GPU.<sup>92</sup> Nvidia and ATI split the rest of the market.<sup>93</sup> The FTC describes entry barriers to this market simply as “high.”<sup>94</sup> But it goes on to point out that GPUs are complimentary to CPUs, and therefore open connections between the CPU, GPU, and other chipsets must be interoperable.<sup>95</sup> Because Intel controls most of the CPU market, it “dictates the interoperability” of these connections.<sup>96</sup>

### B. *Intel's Conduct*

The complaint divides Intel's conduct into four categories, which this Article will mirror organizationally to provide a clear picture of how the FTC views certain arrangements. First is the chipmaker's exclusive agreements with computer manufacturers.<sup>97</sup> Second is its deceptive software design.<sup>98</sup> Third is its conduct in the GPU market, which includes tampering with interoperability, deceptive software design, and bundling to accomplish predatory pricing. Fourth is Intel's misrepresentations in the standard-setting process.<sup>99</sup>

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87. Intel Complaint, *supra* note 6, ¶ 38.

88. *Id.* ¶ 39.

89. *Id.* ¶¶ 16–17.

90. *Id.* ¶¶ 17–18.

91. *Id.*

92. Intel Complaint, *supra* note 6, ¶¶ 37, 75.

93. *Id.* ¶ 75.

94. *Id.* ¶ 76.

95. *Id.* ¶ 80.

96. *Id.*

97. Intel Complaint, *supra* note 6, ¶¶ 49–55.

98. *Id.* ¶¶ 56–71.

99. *Id.* ¶¶ 75–91. Note this allegation seems to have been dropped because it does not appear in the Analysis of Proposed Consent Order to Aid Public Comment. See *supra* note 76 and accompanying text (comparing the Intel Analysis with the Intel Complaint).

### 1. Intel's Exclusivity Agreements with Computer Manufacturers

The FTC alleged that Intel forced or attempted to force the largest computer makers, called Original Equipment Manufacturers (OEMs), to use only Intel CPUs.<sup>100</sup> These OEMs are Hewlett-Packard/Compaq, Dell, IBM, Lenovo, Toshiba, Acer/Gateway, Sun, Sony, NEC, Apple, and Fujitsu.<sup>101</sup> Together they account for sixty percent of computers with CPUs.<sup>102</sup> Because of Intel's dominant share of the CPU market, it is a necessary supplier to every OEM, and therefore each OEM could not shift "all or even a majority of their CPU purchases away from Intel."<sup>103</sup>

The first tactic Intel allegedly used was to keep OEMs from advertising and distributing non-Intel computers.<sup>104</sup> It accomplished this by threatening to withhold rebates, technical support, or supply; it also threatened to terminate joint development projects.<sup>105</sup> The chipmaker also "presented scorecards to the OEMs, evaluating their compliance" with Intel's exclusivity requirements.<sup>106</sup>

Intel's second strategy was to offer market share and volume discounts.<sup>107</sup> The FTC essentially claims that these discounts were predatory. When Intel offered a market share discount or volume discount, it allegedly priced its CPUs below cost.<sup>108</sup> The cost definition is "average variable cost plus an appropriate level of contribution towards sunk costs."<sup>109</sup> Because the FTC had already concluded that Intel was a monopolist, it claimed that it was likely to recoup any losses incurred by pricing below cost.<sup>110</sup>

A third strategy was price discrimination for OEMs based on whether they purchased "certain volumes of CPUs from Intel's competitors."<sup>111</sup> Because of Intel's unmatched scale in supplying CPUs,

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100. Intel Complaint, *supra* note 6, ¶ 49.

101. *Id.*

102. *Id.* ¶ 49.

103. *Id.* ¶ 50.

104. *Id.* ¶ 52.

105. Intel Complaint, *supra* note 6, ¶ 52.

106. *Id.*

107. *Id.* ¶ 53.

108. *Id.*

109. *Id.*

110. Intel Complaint, *supra* note 6, ¶ 53. Interestingly, the FTC asserted that a Section 5 claim does not require that the predatory pricing firm be capable of recouping its losses, which is a departure from the Supreme Court's standard, briefly stated as follows: "The second prerequisite to holding a competitor liable under the antitrust laws for charging low prices is a demonstration that the competitor had a reasonable prospect, or, under § 2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993).

111. Intel Complaint, *supra* note 6, ¶ 53.

some of its chips allegedly do not face any competition; these “uncontested” chips are the OEMs’ only choice.<sup>112</sup> These are distinguished from “contested” CPUs, which do face competition.<sup>113</sup> Intel allegedly offered an incentive for OEMs who purchased only a low volume of CPUs from its competitors: prices on the contested CPUs *and* uncontested CPUs were lower than the prices OEMs would get if they purchased a high volume of competitors’ chips.<sup>114</sup> By contrast, Intel punished OEMs that purchased a high volume of its competitors’ CPUs: prices on contested and *uncontested* CPUs were higher than the prices they would have received if they purchased a low volume of competitors’ chips.<sup>115</sup>

The fourth strategy, which the FTC claims was “to discipline and punish OEMs that chose to deal with Intel’s competitors,” was to offer rewards to OEMs that exclusively (or nearly exclusively) purchased from Intel.<sup>116</sup> These rewards included “the best pricing, supply guarantees in times of shortage, . . . indemnification from patent liability,” and a “slush fund” to help OEMs outbid their competitors.<sup>117</sup>

All four of these strategies have teeth because large OEMs had no choice but to purchase Intel’s uncontested CPUs and at least some volume of contested CPUs from Intel because it is the sole chipmaker capable of supplying all requirements for large OEMs.<sup>118</sup> Thus, an OEM seeking to bargain with Intel could not credibly threaten to forgo its chips, because rival chipmakers could not fulfill all of an OEM’s requirements.<sup>119</sup>

## 2. Intel’s Deceptive Software Design

Intel’s second anticompetitive tactic came through its compiler software. Compiler software translates the language of computer programmers, called source code, into the language of CPUs, called object code.<sup>120</sup> The harm alleged is that the chipmaker designed its software to run slower on AMD CPUs than on Intel CPUs.<sup>121</sup>

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112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. Intel Complaint, *supra* note 6, ¶ 54.

117. *Id.*

118. *Id.* ¶ 50.

119. *Id.*

120. *Id.* ¶ 57. The complaint discusses libraries in connection with the compiler software. Libraries are usually bundled together with the compiler software and serve as a reference to “collections of code for performing certain functions that can be referred to by software programmers rather than rewriting code each time the functions are performed.” *Id.*

121. Intel Complaint, *supra* note 6, ¶ 58.

The FTC here equates “deceptive practices” with competitive harm.<sup>122</sup> Such practices include Intel’s failure to disclose its redesign and its manifestation that “programs inherently performed better on Intel CPUs than on competing CPUs.”<sup>123</sup> These “false or misleading” representations made the “slower performance of non-Intel CPUs on Intel-compiled software applications appear[ ] to be caused by the non-Intel CPUs rather than Intel software.”<sup>124</sup> Furthermore, its software redesign had “no sufficiently justifiable technological benefit.”<sup>125</sup>

The reason these practices are supposed to be anticompetitive is twofold: (1) they “deprived consumers of an informed choice between Intel chips and rival chips, and between Intel software and rival software,” and (2) they “raised rivals’ costs of competing in the relevant CPU markets.”<sup>126</sup> As for the latter claim that this practice “raised rivals’ costs,” the complaint is silent on how it does so.<sup>127</sup>

As to the former, the FTC parsed out the effects of these representations on industry benchmarking organizations. These organizations run programs on different computer systems and assess the relative performance of these systems.<sup>128</sup> The benchmark results provide the measure by which “consumers decide on purchases, OEMs select components, and CPU producers make pricing and model number designations.”<sup>129</sup> Because several benchmarking organizations used Intel’s compiler software,<sup>130</sup> and because the chipmaker promoted its product by claiming these results reflected accurate “real world” performance,<sup>131</sup> Intel’s “material and false or misleading” representations “eroded the credibility and reliability of these benchmarks and the software compiled by Intel compilers.”<sup>132</sup> The FTC claims that Intel “had a duty . . . to disclose the complete truth, which would have eliminated most if not all of the harm to competition and consumers.”<sup>133</sup>

Intel carried out its final alleged step through independent software vendors (ISVs). ISVs are companies that create task-specific

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122. *Id.* ¶ 59.

123. *Id.*

124. *Id.*

125. *Id.* ¶ 61.

126. Intel Complaint, *supra* note 6, ¶ 61.

127. *See id.* ¶¶ 56–71.

128. *Id.* ¶ 62.

129. *Id.*

130. *Id.* ¶ 64.

131. Intel Complaint, *supra* note 6, ¶¶ 65–68.

132. *Id.* ¶ 71.

133. *Id.*

software, such as anti-virus programs, to operate on a Microsoft or Apple system.<sup>134</sup> The chipmaker paid ISVs to use its compilers, which, because of the design discussed above, “favor[ed] Intel’s CPUs.”<sup>135</sup> The firm also required that ISVs only list Intel’s name on their products, which “created a false impression that the ISV was incompatible with non-Intel CPUs.”<sup>136</sup> Finally, Intel is said to have prevented ISVs from joint ventures to market and develop products with other chipmakers “by causing those ISVs to fear that Intel would withdraw its support for their products.”<sup>137</sup>

### 3. Intel’s Anticompetitive Conduct in the GPU Market

Intel faces stronger competition in the GPU market, and it has allegedly sought to stunt the growing threat of its competitors, Nvidia and ATI.<sup>138</sup> It has done so in three ways: first, by denying the interoperability of chipsets that integrate the CPU and GPU;<sup>139</sup> second, by designing its software to reduce speed when working with competitors’ GPUs;<sup>140</sup> third, by bundling its own CPUs and GPUs below cost.<sup>141</sup> These practices are supposed to have anticompetitive potential because Intel’s alleged monopoly in the CPU market “dictates” interoperability between the connections that allow communication between Intel’s CPUs and rival GPUs.<sup>142</sup> Intel has “allowed unhindered accessibility to these interfaces and encouraged others to become reliant on that accessibility.”<sup>143</sup> However, now that GPU makers, OEMs, and consumers have become “dependent” on the Intel interfaces, Intel has allegedly limited accessibility “to enhance or obtain monopoly power in the relevant markets.”<sup>144</sup>

For the first tactic, the FTC details Intel’s denial of interoperability with Nvidia. The two firms worked together for several years to ensure interoperability and Intel licensed Nvidia to manufacture GPUs to be used with Intel CPUs.<sup>145</sup> However, Intel has now “reversed its previous course . . . , thereby foreclosing Nvidia’s integrated chipsets

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134. See *United States v. Microsoft Corp.*, 253 F.3d 34, 75 (2001) (describing specific ISVs such as Symantec and its antivirus software and Netscape and its internet browser).

135. Intel Complaint, *supra* note 6, ¶ 73.

136. *Id.* ¶ 74.

137. *Id.*

138. *Id.* ¶¶ 75–79.

139. *Id.* ¶ 81.

140. Intel Complaint, *supra* note 6, ¶¶ 86–87.

141. *Id.* ¶¶ 88–89.

142. *Id.* ¶ 81.

143. *Id.*

144. *Id.*

145. Intel Complaint, *supra* note 6, ¶¶ 82–83.



from connecting to Intel's future CPUs."<sup>146</sup> It is also said to have "misled Nvidia on Intel's 'roadmaps' . . . , causing Nvidia to waste resources and crucial time researching and designing integrated chipsets when, in fact, Intel allegedly had no intention"<sup>147</sup> of allowing the chips to work together.

For the second factor, Intel's reduced performance with non-Intel GPUs, the FTC claims that "Intel has created several interoperability problems, including reductions of speed and encryption, that have had the effect of degrading the industry standard interconnection with Intel's CPUs."<sup>148</sup> It appears that the FTC alleged that Intel slowed its own performance in order to sabotage the development of General Purpose GPU performance. The Analysis to Aid in Public Comment sheds a bit more light on the idea: "Intel took steps to create technological barriers to preclude non-Intel integrated chipsets from interconnecting with future Intel CPUs."<sup>149</sup> Thus, in an effort to assure that high-functioning GPUs do not compete with Intel's CPUs, the chipmaker allegedly dismissed the opportunity for increased performance and instead took steps to decrease performance in its own connections with its own CPUs.

The third claim is a straight-forward bundling claim. The FTC alleges that Intel combines its CPUs with its GPUs and then prices this bundle "to deter OEMs from pairing Intel CPUs with non-Intel GPUs."<sup>150</sup> This "has resulted in below-cost pricing" whenever "Intel is likely to recoup . . . any losses that it suffered."<sup>151</sup> Some OEMs purchased the bundle and nevertheless discarded Intel's GPU to replace it with an Nvidia GPU, but when Intel learned of this, it increased prices to these OEMs and offered a lower price to OEMs that would use the complete Intel bundle.<sup>152</sup>

Together, these practices allegedly "enhanced [Intel's] monopoly in the relevant CPU markets."<sup>153</sup> They "create[d] a dangerous probability that it will acquire a monopoly in the GPU markets."<sup>154</sup> Finally, they have "no legitimate or sufficient business justification,"

146. *Id.* ¶ 84.

147. Intel Analysis, *supra* note 9, at 48,341.

148. Intel Complaint, *supra* note 6, ¶¶ 86–87.

149. Intel Analysis, *supra* note 9, at 48,342.

150. Intel Complaint, *supra* note 6, ¶ 88.

151. *Id.* As noted earlier, for purposes of the complaint, cost is "average variable cost plus an appropriate level of contribution towards sunk costs." See *supra* note 109 and accompanying text.

152. Intel Complaint, *supra* note 6, ¶ 89.

153. *Id.* ¶ 90.

154. *Id.* ¶ 91.

and, the FTC concludes, it harms “competition, innovation, and consumers.”<sup>155</sup>

#### 4. Intel’s “Unfair Methods of Competition” in Industry Standards

The final allegation accused of Intel was that the firm manipulated industry standards in a way to benefit its own products and thwart others. Specifically, the chipmaker is said to have tampered with the industry standards controlling elements of Universal Serial Bus (USB) and High Definition Content Protection (HDCP) ports.<sup>156</sup> It allegedly induced firms to rely on its standard, represented that they would be fairly accessible, and then delayed accessibility to the standards.<sup>157</sup> The FTC alleges that it did so to “gain a head start . . . and wrongfully restrain competition.”<sup>158</sup> Because it had no offsetting procompetitive efficiencies, concluded the FTC, it deterred competition and enhanced Intel’s monopoly power with CPUs.<sup>159</sup> This claim, however, is not in the Analysis to Aid Public Comment, which was released the same time as the Decision and Consent Order; thus, it was dropped at some point in the proceedings.<sup>160</sup>

#### C. *Intel’s Anticompetitive Effects*

Intel’s conduct allegedly harmed consumers and competition by way of “higher prices” for CPUs and GPUs.<sup>161</sup> But the comparative adjective “higher” is alone in the Complaint; the FTC does not articulate the measure from which it concludes prices increased. Intel also apparently committed other anticompetitive acts: it reduced competition to innovate; it inhibited competitors from effectively marketing; it reduced output of CPUs and GPUs; it raised rivals’ costs; it deprived consumers of their choice of CPUs and GPUs by harming choice at the OEM level; it reduced incentive to innovate; and, finally, it reduced the quality of industry benchmarking.<sup>162</sup>

### III. THE STATED AND IMPLIED RULES

The FTC articulates a broad set of rules to condemn Intel’s conduct. Because Intel settled with a Consent Decree, no more development of

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155. *Id.*

156. *Id.* ¶ 92.

157. Intel Complaint, *supra* note 6, ¶ 92.

158. *Id.*

159. *Id.*

160. See Intel Analysis, *supra* note 9, at 48,341 to 42.

161. Intel Complaint, *supra* note 6, ¶ 94(a).

162. *Id.* ¶ 94(b)–(h).

the standard occurred through the Decision and Order, and so the Complaint is the only source from which to draw out the rule. While it is unfortunate that the FTC did not apply a clear standard, it is at least helpful to articulate the conduct that caught its attention; indeed, that may be all the certainty this case has to offer. The following analysis attempts to outline the rules the FTC only briefly mentions.

The "course of conduct" theory controls the complaint. The statement of law beginning the complaint makes this clear;<sup>163</sup> so does the fact that every allegation at the conclusion of the complaint incorporates every paragraph that describes Intel's conduct.<sup>164</sup> The FTC asserts its authority under Section 5 to condemn

any course of conduct that causes actual or incipient harm to competition. Moreover, where a respondent that has monopoly power engages in a course of conduct tending to cripple rivals or prevent would-be rivals from constraining its exercise of that power, and where such conduct cumulatively or individually has anticompetitive effects or has a tendency to lead to such effects, that course of conduct falls within the scope of Section 5. Respondent may defend against such charges, however, by proving that any actual or incipient anticompetitive effects resulting from the Respondent's course of conduct are offset by procompetitive effects, and that engaging in that course of conduct was reasonably necessary to achieve those offsetting procompetitive effects.<sup>165</sup>

Three parts emerge from this formulation. First, the FTC can question a course of conduct causing "actual or incipient harm" to competition. This apparently does not depend on market power because the following additional ground for enforcement applies when a respondent has monopoly power. Second, the agency can question a monopolist's course of conduct when it tends to either (1) cripple rivals or (2) prevent potential rivals from constraining monopoly power. Under either of these two elements, the FTC must show the conduct to create either (1) actual anticompetitive effects or (2) a tendency to lead to such effects. Third, the respondent can defend by showing (1) procompetitive justifications that offset the anticompetitive effects and (2) the course of conduct was reasonably necessary.

Additionally, two sets of implied rules can be extrapolated from the allegations against Intel. The first set applies only to respondents with monopoly power.<sup>166</sup> One proscription seems to be that a monopolist may not simultaneously withhold benefits from disloyal buyers and

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163. *Id.* ¶ 1.

164. *Id.* ¶¶ 97-105.

165. *Id.* ¶ 1.

166. Intel Complaint, *supra* note 6, ¶ 5.

provide benefits to loyal buyers.<sup>167</sup> Another is that market share or volume discounts may not foreclose some aspect of competition.<sup>168</sup> Next, product design changes must have a legitimate technical benefit.<sup>169</sup> Moreover, a product design change that affects the performance of a competitor's product requires disclosure of such "material" information.<sup>170</sup> Finally, a respondent may not pressure third-party vendors to advertise compatibility with the respondent's product and not its competitor's product.<sup>171</sup>

The second set of implied rules applies to conduct that "could allow [respondent] to acquire a monopoly."<sup>172</sup> First, when a firm has a monopoly in one market, it may not deceive producers in a complimentary market regarding interoperability between its monopoly product and the complimentary product.<sup>173</sup> Also, a respondent's previous course of dealing may create a duty to deal and cooperate with its competitors regarding interoperability.<sup>174</sup> Under the latter circumstances, respondents may not then create barriers to interoperability.<sup>175</sup> Finally, in a bundling claim where a respondent prices below cost, the FTC need not show that it is likely to recoup those costs.<sup>176</sup>

As mentioned previously, the FTC's legal theories in this case are untidy. The complaint uses ninety-six paragraphs to explain Intel's conduct, and all ninety-six of them constitute "unfair methods of competition" and "unfair acts or practices."<sup>177</sup> Additionally, paragraphs fifty-six through ninety-six (Part B, subsections 2 – 4, *supra*) count as "deceptive acts or practices."<sup>178</sup> Accordingly, there is no way to guide analysis using familiar legal elements as guideposts; therefore, the only definitive answer to determine what triggers FTC intervention is the fact pattern illustrated above, as the agency sees it. Herein lies the central criticism of Section 5: No one knows what is illegal until it is too late. But it need not be so. The following analysis seeks to explore the relative merits and faults with the above set of rules. It also

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167. *Id.* ¶ 6.

168. *Id.* ¶ 9.

169. *Id.* ¶ 8.

170. *Id.* ¶ 10.

171. Intel Complaint, *supra* note 6, ¶ 10.

172. *Id.* ¶ 14.

173. *Id.* ¶ 18.

174. *Id.* ¶¶ 20–21.

175. *Id.* ¶ 18.

176. Intel Complaint, *supra* note 6, ¶ 18.

177. *Id.* ¶ 97–105.

178. *Id.* ¶ 103.

proposes a set of guideposts that may contain this otherwise amorphous provision.

#### IV. ANALYSIS OF THE FTC'S COURSE OF CONDUCT RULE

The following analysis examines the justifications for FTC intervention on the basis of each of the three elements of the course of conduct rule mentioned above. First is conduct causing "actual or incipient harm" to competition when a firm does not have market power. Second is conduct that either cripples rivals or prevents potential rivals from constraining monopoly power. Third is anticompetitive effects. Briefly summarized, the first prong is only justifiable with respect to incipient conduct that would lead to a per se Sherman Act violation. The second element is only justifiable in the case of deception or when the conduct falls under no other law and has measurable anticompetitive effects. Finally, anticompetitive effects should refer to aggregate harm in the form of market distortions and should not be limited to end-user harm alone.

##### A. *Causing Actual or Incipient Harm without Market Power*

The FTC asserts the power to condemn "any course of conduct that causes actual or incipient harm to competition."<sup>179</sup> This statement breaks into three parts. First is actual harm, second is incipient harm, and third is the unstated question of market power under both types of harm. Analysis will first examine the question of market power and conclude that the FTC will have no ability to find "actual harm" when a firm does not have market power. However, the "incipient harm" analysis will show that the Commission may have justifiable power to enjoin burgeoning conduct that would clearly become a per se Sherman Act violation. This may involve firms without market power, but it would only apply to them if the conduct, left unchecked, would be an unlawful use of market power. Additionally, because incipient conduct is a particularly sensitive area where an incorrect decision could eliminate socially desirable innovation, the FTC must limit itself to benchmarks of certainty that have proven track records in Sherman Act jurisprudence. Finally, the Commission's authority in this element should be limited to examining firms without market power that seek it through illegitimate means; this must be sharply distinguished from firms legitimately competing for a monopoly, as the latter is a highly desirable form of competition.

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179. Intel Complaint, *supra* note 6, ¶ 1.

With respect to the “actual harm” portion of the rule, unfortunately, nothing in the sentence indicates that the firm must have market power. Indeed, the very next sentence of the stated rule encompasses the conduct of “a respondent that has monopoly power.”<sup>180</sup> Giving effect to every word in the rule, one reading is that the FTC asserts the power to stop practices that cause “actual or incipient harm to competition” even when the offending firm does not have market power.<sup>181</sup>

For this reading of the “actual harm” portion of the rule to have any impact, courts would have to recognize harm to competition in the absence of market power. They will not. One of the most basic principles of antitrust law and its economic underpinnings is that competitive harm exists only when the defendant has market power.<sup>182</sup> Thus, given that all courts and scholars agree that market power and actual harm to competition are coterminous,<sup>183</sup> part of this reading of the rule would be unenforceable in the courts.

However, the second prong, “incipient harm,”<sup>184</sup> may be a more viable means of enforcement for the FTC when a firm does not have market power. The Commission has a fairly robust history of enjoining one type of incipient harm: an invitation to collude.<sup>185</sup> These cases do not allege that the offending firms have market power, and indeed, one commissioner has argued that such a requirement would stifle enforcement efforts because a required showing of market power would act as a shield, giving firms who would form a price-fixing cartel “a free bite” at attempting to collude.<sup>186</sup> It is also important to note that once collusion exists, the cartel itself is the entity with market power, not necessarily the firms that constitute it. Therefore, an enforcement effort against invitations to collude would require that the FTC have the authority to pursue firms that do not have market power.

In a recent case of this nature, the FTC articulated several sound arguments in favor of its authority to enjoin invitations to collude:

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180. *Id.*

181. *Id.*

182. See, e.g., Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 20 (1984); Alan J. Messe, *Price Theory, Competition, and the Rule of Reason*, 2003 U. ILL. L. REV. 77, 106 (2003).

183. See Messe, *supra* note 182, at 106.

184. Intel Complaint, *supra* note 6, ¶ 1.

185. See Valassis Comm'ns, Inc., 141 F.T.C. 247, 282–83 (2006).

186. Quality Trailer Prods. Corp., 115 F.T.C. 944, 951–52 (1992) (Comm'r Deborah K. Owen, concurring statement).

First, it may be difficult to determine whether a particular solicitation has or has not been accepted. Second, even an unaccepted solicitation may facilitate coordinated interaction by disclosing the solicitor's intentions or preferences. Third, the antisolicitation doctrine serves as a useful deterrent against conduct that is potentially harmful and that serves no legitimate business purpose.<sup>187</sup>

In addition to the FTC's asserted rationales, this type of injunction is consistent with broader competition policy goals embodied in Sherman Act jurisprudence. One such goal, perhaps the most central, is ensuring that the laws themselves do not bring about the effect they seek to proscribe;<sup>188</sup> that is, competition law should not foreclose procompetitive business arrangements.

The invitation-to-collude cases produce no such effect. The purpose of these cases is to prevent a price-fixing cartel. A price-fixing cartel is correctly per se unlawful in the first place because it has such a high likelihood of harm to competition and an equally unlikely potential for procompetitive justifications.<sup>189</sup> While it is possible that price-fixing in some circumstances may be socially desirable, for example, to ensure that corporations stay afloat during a severe recession, those circumstances are sufficiently rare that, on balance, "the law can more efficiently assume that collusion is always harmful."<sup>190</sup> It thus presents no problems to hold it per se unlawful because chilling competition is unlikely.<sup>191</sup> Given that the optimal rule of law is an absolute ban on the practice itself, an injunction on an invitation to do the practice should compliment the Sherman Act's currently ideal level of enforcement in this area. Thus, it is wise and within the bounds of sound competition policy to enjoin invitations to collude.

However, the Commission must be cautious in enjoining invitations to collude and other "incipient" behavior. As Commissioner Deborah K. Owen noted, sometimes a legitimate joint venture that is otherwise procompetitive may involve two competitors discussing price, as was the case in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*<sup>192</sup> Therefore, the FTC should only condemn burgeoning conduct when it can be certain that such practice, when full blown, would be a per se Sherman Act violation.

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187. *Valassis*, 141 F.T.C. at 283 (citing 6 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTI-TRUST LAW* ¶ 1419 (2003)).

188. *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 414 (2004) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)).

189. *See* Devlin & Jacobs, *supra* note 23, at 125-26.

190. *Id.* at 126.

191. *See* Hovenkamp, *supra* note 14, at 882.

192. *Quality Trailer Prods. Corp.*, 115 F.T.C. 944, 951-52 (1992) (Comm'r Deborah K. Owen, concurring statement) (citing *Broad. Music Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979)).

This is no longer a categorical inquiry. The Supreme Court issued a firm decree in *California Dental Ass'n v. FTC* that there is no bright line between per se illegal conduct and that which requires rule of reason analysis.<sup>193</sup> The current standard under *California Dental* states that

[t]he object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principle tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one. And of course what we see may vary over time, if rule-of-reason analyses in case after case reach identical conclusions.<sup>194</sup>

Therefore, the FTC must only enjoin conduct with a proven, reliable, and well-established pattern of competitive harm. This can only come when rule of reason analyses reach the same conclusion time after time.

Additionally, *Microsoft* exposes reasons for courts, and necessarily the FTC, to hesitate to enjoin unfamiliar conduct. In *Microsoft*, the court declined to hold a product tie per se illegal in the operating system market because such a holding “might stunt valuable innovation.”<sup>195</sup> Per se rules correctly apply when courts have significant experience with a particular act; the rules allow courts to confidently conclude that their ban causes “very little loss to society” and that “an inquiry into its costs in the individual case can be considered unnecessary.”<sup>196</sup> Because “efficiencies are common in technologically dynamic markets where product development is especially unlikely to follow an easily foreseen linear pattern,” the court found it unjustifiable to conclude that Microsoft’s product tie should fall under per se analysis.<sup>197</sup>

While *Microsoft*’s holding is limited to the facts of its case,<sup>198</sup> its reasoning has broad support in the Supreme Court.<sup>199</sup> *NCAA v. Board of Regents of the University of Oklahoma* noted that judicial inexperience counsels against extending the reach of per se rules,<sup>200</sup> and *Trinko* cited *Matsushita* when it noted that mistaken inferences in the myriad means of legitimate competition are “especially costly” in

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193. *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 779 (1999). See also *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 35 (D.C. Cir. 2005).

194. *Cal. Dental*, 526 U.S. at 781.

195. *United States v. Microsoft Corp.*, 253 F.3d 34, 92 (D.C. Cir. 2001).

196. *Id.* at 94 (citing *Jefferson Parish Hosp. Dist. v. Hyde*, 466 U.S. 2, 33–34 (1984)).

197. *Id.*

198. *Id.* at 95.

199. *Id.* at 94.

200. *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 101 n.21 (1984).



the field of antitrust.<sup>201</sup> This reasoning thus should give pause to the FTC and courts examining the agency's decisions before they enjoin conduct in its incipency that does not have a high degree of certain illegality under well-established case law.

An additional limit must constrain the FTC as it scrutinizes the conduct of firms without market power: it must not enjoin a firm's conduct simply because it seeks market power. This clarification is critical to fostering healthy competition because there are strong reasons to allow firms to compete for monopoly status. Consider Judge Posner's summary of Joseph Schumpeter's "gale of creative destruction:"

[C]ompetition to obtain a monopoly is an important form of competition. . . . The more protection from competition that the firm that succeeds in obtaining a monopoly will enjoy, the more competition there will be to become that monopolist; and provided that the only feasible or permitted means of obtaining the monopoly are socially productive, this competition may be wholly desirable.<sup>202</sup>

In the debate over how best to foster innovation, this is a distillation of its principles that most economists agree with<sup>203</sup> and it is the view that the Supreme Court endorses.<sup>204</sup> Thus, the Commission should refrain from intervening when firms legitimately compete to become monopolists.

In sum, the first portion of this prong of the rule, which seems to claim the power to condemn conduct that causes "actual harm" to competition even without market power, cannot be enforced because no court will find competitive harm in the absence of market power. Under the second portion of the rule, the Commission is within justifiable bounds to intervene when it sees incipient conduct that, if fully carried-out, would be a per se unlawful exercise of market power. The determination of whether the incipient conduct would be per se unlawful requires that it not enjoin unfamiliar practices. Put differently, the FTC must limit itself to offenses that have consistently shown harm to competition. Finally, while the Commission will need the ability to question firms without market power in order to properly enjoin invitations to collude and similar practices, it should not question firms that are fully competing to obtain a monopoly.

201. *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 414 (2004).

202. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 10.11, at 331-32 (7th ed. 2007).

203. See, e.g., Jonathan B. Baker, *Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation*, 74 ANTITRUST L.J. 575, 577-89 (2007).

204. *Trinko*, 540 U.S. at 407.

### B. *Conduct Against Rivals Having Anticompetitive Effects*

Under the agency's second prong, it can proscribe a monopolist's course of conduct when it tends to either (1) cripple rivals or (2) prevent potential rivals from constraining monopoly power.<sup>205</sup> A further requirement under either element is actual anticompetitive effects or a tendency to lead to such effects.<sup>206</sup>

#### 1. Crippling Rivals

With respect to crippling rivals, the FTC would be on an interesting line apart from the Sherman Act were it not for the sub-element of anticompetitive effects or their tendency. A maxim of the Sherman Act is its concern is "with the protection of competition, not competitors."<sup>207</sup> Thus, the language of condemning the "crippling of rivals" raises immediate skepticism that the FTC would have to overcome by showing that Section 5 should interfere when one firm harms another. The competitive harm requirement nevertheless refocuses the rule into the arena of competition law.

The question then is the proper role for the FTC with respect to conduct that cripples rivals and harms competition. On one hand, the Sherman Act covers several areas of conduct in which one firm harms another, such as predatory pricing schemes. On the other hand, common law covers still more types of conduct in which one firm harms another, such as misappropriation of trade secrets. The FTC already has the power to enforce the provisions of the Sherman Act,<sup>208</sup> and so the relevant questions are (1) whether the Commission should condemn conduct that falls into common law, and (2) if not, whether any conduct remains untouched by the Sherman Act and common law which the FTC should condemn.

Common law theories that businesses frequently use in this context include interference with contractual relations, misappropriation of trade secrets,<sup>209</sup> and fraud.<sup>210</sup> The first theory, interference with contractual relations, should not be a tool of FTC enforcement. The elements of an interference claim vary widely from state to state, but its basis in all states comes from the English case *Lumley v. Gye*.<sup>211</sup>

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205. See *supra* note 165 and accompanying text.

206. See *supra* note 165 and accompanying text.

207. *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

208. *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 454 (1986).

209. See 86 C.J.S. *Torts* §§ 41–67 (2011).

210. See 37 C.J.S. *Fraud* § 1 (2011).

211. *Lumley v. Gye*, (1853) 118 Eng. Rep. 749 (Q.B.). See also Harvey S. Perlman, *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U. CHI. L. REV. 61, 63 (1982).

There, an opera singer had a contract with Lumley, but opted to sing for Gye because he had offered a higher fee.<sup>212</sup> The Queen's Bench announced a rule of liability for maliciously "interrupting a personal service contract, regardless of the means used."<sup>213</sup> Prominent scholars, including Dan B. Dobbs,<sup>214</sup> Richard A. Epstein,<sup>215</sup> and Harvey S. Perlman,<sup>216</sup> have objected to the tort for various reasons, most notably for its tendency to deter efficient breaches<sup>217</sup> and its hindrance of the competitive markets.<sup>218</sup>

Competition policy accepts that its rules are a set of incentives and disincentives and seeks to encourage firms to reduce prices for consumers.<sup>219</sup> By contrast, the interference tort is based on the nebulous terms of fairness and justice, with no concern for the incentives its rule creates.<sup>220</sup> As a result, plaintiffs who lose an antitrust claim can often use the interference tort in state court and still prevail with substantial damages.<sup>221</sup> As a result of these conflicting incentives and liabilities, the potential defendant, which has been encouraged to offer its lowest prices at all times by competition law, is at the same time hamstrung from offering its best deal when it knows that its rival has already contracted at a less advantageous price. Therefore, the FTC should not enforce the tort of intentional interference with contractual relations because the tort itself is questionable under various rationales, and because it is contrary to the central goals of competition policy.

The next area, misappropriation of trade secrets, is equally unjustifiable for FTC enforcement. A trade secret claim generally has three elements: (1) the information must be secret; (2) the plaintiff must have taken reasonable precautions to protect the secret; and (3) the defendant must have taken the information wrongfully.<sup>222</sup> Scholars do not agree as to whether this rule sounds in tort, property, or contract, but Mark Lemley makes a compelling case for trade secret law

212. Perlman, *supra* note 211, at 63.

213. *Id.* at 63–64 (citing *Lumley*, 118 Eng. Rep. at 752).

214. Dan B. Dobbs, *Tortious Interference with Contractual Relationships*, 34 ARK. L. REV. 335, 344 (1980).

215. Richard A. Epstein, *Inducement of Breach of Contract as a Problem of Ostensible Ownership*, 16 J. LEGAL STUD. 1, 22–23 (1987).

216. Perlman, *supra* note 211, at 97–98.

217. *Id.* at 89–90.

218. Epstein, *supra* note 215, at 22–23.

219. *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224, 226 (1993).

220. *See Dobbs, supra* note 214, at 363–65.

221. *See Marina Lao, Tortious Interference and the Federal Antitrust Law of Vertical Restraints*, 83 IOWA L. REV. 35, 61 (1997).

222. *See Mark A. Lemley, The Surprising Virtues of Treating Trade Secrets as IP Rights*, 61 STAN. L. REV. 311, 317 (2008); Unif. Trade Secrets Act §§ 1–3, 14 U.L.A. 433 (1985).

to be classified as an intellectual property (IP) issue.<sup>223</sup> Under his framework, trade secret law is one more incentive in the IP regime to encourage innovation: when a firm can rely on legal control and exclusivity, it can charge supracompetitive prices, and this prospect encourages innovation.<sup>224</sup> As for its place within the IP regime, trade secret law functions best when it protects information that is impossible to obtain through reverse engineering, such as the recipe for Coca-Cola, while patent law functions best to protect information that would be discernable through reverse engineering.<sup>225</sup>

Therefore, trade secret law has powerful justifications; however, the FTC's potential role in this area is difficult to justify. If the information were truly secret, then the Commission would have little reason or ability to become aware of a misappropriation except through a tip from the aggrieved firm. That company has the private right to seek injunctive relief and punitive damages.<sup>226</sup> With this regime in place, there is little incentive for the complainant to defer to the FTC because a higher reward would come from private enforcement. It is furthermore unlike traditional competition law claims because the injury is discrete and limited, whereas a typical antitrust claim has market-wide effects that hurt not only the aggrieved firm but also consumers across the market. Thus, from a competition policy perspective, the FTC's involvement here is unjustifiable.

The final frequently used common law doctrine for harm to a business is fraud. Broadly, fraud is "an intentional perversion of the truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or her or to surrender a legal right."<sup>227</sup> An instrumentalist justification for prohibiting fraud is that it is socially wasteful: the liar "makes a positive investment in manufacturing and disseminating misinformation."<sup>228</sup> With respect to disclosure of information, inasmuch as the fraud regime generally allocates the burden of discerning information in the least socially costly manner, it is an efficient rule.<sup>229</sup>

The FTC already correctly deters fraud through the "deceptive acts or practices" portion of the FTC Act.<sup>230</sup> In one statement of its rule,

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223. See generally Lemley, *supra* note 222.

224. *Id.* at 329–30.

225. *Id.* at 339. See also Alan Devlin, *The Misunderstood Function of Disclosure in Patent Law*, 23 HARV. J.L. & TECH. 401, 417–18 (2010).

226. Unif. Trade Secrets Act § 2, 14 U.L.A. 433 (1985).

227. 37 C.J.S. *Fraud* § 1 (2011).

228. POSNER, *supra* note 202, § 4.7, at 111.

229. *Id.* at 112–13.

230. 14 U.S.C. 45(a)(1) (2006).

the Commission proscribes "first, . . . a representation, omission, or practice that, second, is likely to mislead consumers acting reasonably under the circumstances, and third, . . . is material."<sup>231</sup> This focuses on a firm's deception of consumers, most typically in advertising.<sup>232</sup> This kind of intervention is justifiable under a consumer protection or competition policy standpoint for several reasons. First, in a competitive market, the misrepresentations of one rival may divert such a small number of sales from each competitor that insufficient incentive exists to correct the rival's fraud.<sup>233</sup> Second, when a monopolist lies, even less incentive exists for its fringe competitors to correct it because, by definition, there is no close substitute for the monopolist's product; therefore, if another firm is sufficiently distant for the monopolist to have a true monopoly, the lies will have even less effect on it than in the case of a competitive market.<sup>234</sup> Third, when a misrepresentation applies to all sellers and it is beneficial to them (for example, if one cigarette company states that cigarettes are healthy) there is a disincentive for any rival to correct the lie.<sup>235</sup> Thus, the FTC's intervention when a firm misrepresents its products may be necessary to overcome the disincentive for private enforcement, and is therefore a justifiable mechanism of competition policy.

The final avenue to explore is whether some conduct against rival firms exists that is neither a common law violation nor a Sherman Act violation, but still has sufficient impact on competition to warrant FTC intervention. This appears to be the route the FTC took in *N-Data* with respect to a patent hold-up.

In *N-Data*, the firm that had acquired an industry standard promised the industry a flat \$1000 license fee, but N-Data purchased that firm's patent and subsequently charged much more than \$1000.<sup>236</sup> The FTC noted that contract remedies would have been inadequate because it affected an industry-wide standard, which in turn affected many third parties who lacked privity to sue.<sup>237</sup> The Commission pointed out that the patentee's conduct might not be a Sherman Act violation<sup>238</sup> and noted that this was a standalone Section 5 proceeding.<sup>239</sup> The case has met criticism on the grounds that the FTC did not

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231. *Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 165 (1984) (Opinion of the Comm'n).

232. *See id.* at 51-52 (Comm'r Patricia P. Bailey, concurring and dissenting statement).

233. POSNER, *supra* note 202, § 4.7, at 112.

234. *Id.*

235. *Id.* at 113.

236. *N-Data Analysis*, *supra* note 45, at 5847-48.

237. *Id.* at 5849.

238. *Id.* at 5848.

239. *Id.* at 5849 n.9.

adequately show consumer harm, that it turned a contract dispute into an antitrust concern, and that it added uncertainty to the standard-setting process.<sup>240</sup> The proper role of antitrust enforcers in the standard-setting process is beyond the scope of this article, but it must be emphasized that this is an area where firms have reason to be wary of FTC intervention.

More importantly, *N-Data* serves as a vehicle to define workable contours that might contain Section 5: if an act against a rival does not provide the rival with a remedy under any other law, and it is not a Sherman Act violation, then the FTC should use its fact-finding ability to investigate whether the conduct causes harm to competition. If there is clear anticompetitive harm, then the Commission should enjoin the conduct. These limiting principles would have addressed the noted concerns with the *N-Data* case. Under the above test, the Commission would have had to show (1) harm to rivals (2) no other remedies were available to the rivals, (3) the Sherman Act does not apply, and (3) harm to competition. Each of these, fully measured, would have prevented the FTC from making the purported mistakes claimed above.

In sum, the FTC is currently correct in avoiding intervention when there is an interference with contract claim and when there is a misappropriation of trade secrets claim. However, the FTC needs to intervene, as it currently does, in deception cases. Also, the FTC's standalone Section 5 power can be a useful tool to encompass other conduct that brings harm to competition but that falls within no other area of law. Competitive harm analysis will follow shortly, but the next step is the second element of the FTC's course of conduct theory: preventing would-be rivals from constraining monopoly power.

## 2. Preventing Would-be Rivals from Constraining Monopoly Power

The FTC asserts the power to prohibit a course of conduct "tending to . . . prevent would-be rivals from constraining its exercise of [monopoly] power."<sup>241</sup> This element's meaning is murky in the Intel Complaint. However, other mentions of it in a few different places in the Intel Docket fill in the contours of its meaning. First is Commissioner Rosch's Concurrence and Dissent, where he writes that the combination of harm to rivals and high barriers to entry harms competition by constraining rival firms' ability to challenge monopoly

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240. Joshua D. Wright & Aubrey N. Stuenkel, *Innovation for the 21st Century: Harnessing the Power of Intellectual Property and Antitrust Law: Patent Holdup, Antitrust, and Innovation: Harness or Noose?*, 61 ALA. L. REV. 559, 566–67 (2010).

241. Intel Complaint, *supra* note 6, ¶ 1.

power.<sup>242</sup> Second is the Analysis to Aid Public Comment, which cites the absence of substitutes to Intel's x86 CPUs as a lack of constraint to monopoly power.<sup>243</sup> Thus, one reading of the definition of a "constraint" to monopoly power is simply competition. If this reading is accurate, then the import of this rule is to say that the FTC can enjoin a monopolist's course of conduct if it prevents its potential rivals from competing with it.

This rule must embrace a critical limitation, but once it is thus limited, it becomes superfluous and so the FTC need not use this prong. The critical limitation is that innovation and competitive pricing cannot be seen as preventing future rivals from constraining monopoly power. The threat of a rival's entry to a monopolist's market is of paramount importance to ensuring that a monopolist imparts social benefits because a monopolist innovates and keeps its prices from going too high when it perceives the threat of entry by potential rivals.<sup>244</sup> However, a monopolist can innovate and price in such a way as to beat a potential rival to the market and enjoy a first-mover advantage.<sup>245</sup> Interpreted broadly, this could be viewed as "preventing its rivals from competing" with it, but this is a socially desirable outcome. If the monopolist reacts to competitive threats by successfully innovating and pricing the product at a level sufficiently low to keep a new entrant out, it necessarily means that the most efficient producer—the monopolist—is the one delivering the product.<sup>246</sup> A better formulation of the rule then would be to enjoin a course of conduct that *unlawfully* prevents a future rival from constraining monopoly power. The word "unlawful" would refer to acts that are illegal under existing law or that can be shown to produce clear anticompetitive effects; and as noted earlier, the constraint to monopoly power is competition.

Boiled down, the rule thus limited would mean that the FTC prohibits acts that are already illegal and anticompetitive. This formulation is consistent with Sherman Act jurisprudence and all of the justifiable enforcement mechanisms mentioned above. Because these means are already available to the FTC, this portion of the rule is redundant and unnecessary. Therefore, the Commission need not enforce it.

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242. Intel Corp., FTC Docket No. 9341 (Dec. 16, 2009) (Concurring and Dissenting Statement of Comm'r J. Thomas Rosch), <http://www.ftc.gov/os/adjpro/d9341/091216intelstatement.pdf>.

243. Intel Analysis, *supra* note 9, at 48,340.

244. D. Daniel Sokol, *Monopolists without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age*, 4 BERKELEY BUS. L.J. 37, 66 (2007).

245. See Baker, *supra* note 203, at 581–82.

246. *Id.*

### C. *Competitive Harm*

Each one of the proposed elements of this rule is subject to the final requirement of competitive harm. The question of the appropriate measure of competitive harm generally has two poles. Either the appropriate measure is end-user welfare alone or it is aggregate welfare. The theory of the aggregate welfare measure is that any market distortion, including those that occur “upstream” from end-users, may be sufficient to constitute harm to competition.

A microcosm of this debate appears in *Fishman v. Estate of Wirtz*.<sup>247</sup> Judge Easterbrook contends that it is strictly end-user harm.<sup>248</sup> Judge Cudahy contends that aggregate welfare should control so that any market distortion could constitute harm to competition.<sup>249</sup> Judge Easterbrook’s adherence to the end-user measure stems from the Chicago School’s roots in price theory in defining anti-trust policy.<sup>250</sup> Its appeal is its apparent simplicity.<sup>251</sup>

However, the aggregate welfare measure is better justified. First, it is most consistent with antitrust law’s continuously upheld purpose to promote competition.<sup>252</sup> Second, limiting antitrust law’s coverage to downstream consumers alone may reduce net social utility.<sup>253</sup> For example, from a static point of view, a consumer may suffer from the increased prices a monopolist charges, but from a dynamic point of view, that wealth transfer may result in greater innovation and access to improved products in the future.<sup>254</sup> Third, even when there is a so-called wealth transfer from consumers to sellers, that wealth is not separated by some “impermeable barrier,” but it “can percolate through to individual consumers” by means of capital markets and employee stock ownership.<sup>255</sup>

Thus, the aggregate standard embraces monopolies as potentially beneficial market actors. This analysis therefore accepts them as a necessary evil. If the lawful monopolist is an accepted actor in U.S. competition policy, then the law must respond by correcting the nega-

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247. 807 F.2d 520 (7th Cir. 1986).

248. *Id.* at 564 (Easterbrook, J., dissenting).

249. Hon. Richard D. Cudahy & Alan Devlin, *Anticompetitive Effect*, 95 MINN. L. REV. 59, 85–86 (2010) (discussing *Fishman* in detail, for which Judge Cudahy authored the majority opinion).

250. Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 928 (1979).

251. *Id.*

252. *See* Cudahy & Devlin, *supra* note 249, at 89.

253. *Id.*

254. *Id.* at 100, 102–03.

255. *Id.*



tive consequences of its pricing. The solution must ensure that consumers (1) internalize the benefits they confer upon the monopolist and others and (2) accurately signal their demand.

In cases where monopoly pricing is the competitive harm, the FTC's standalone Section 5 power is better than the current Sherman and Clayton Act regime of private rights of class action and treble damages.<sup>256</sup> The most powerful reason is that the latter regime would create a double bind. If the aggregate welfare standard encourages legitimate monopoly innovation,<sup>257</sup> and then penalizes the monopolist with treble damages for properly responding to this incentive, it would be counterproductive.

On the other hand, the FTC's actions under Section 5 do not allow follow-on treble damages.<sup>258</sup> This would solve the objection to Sherman and Clayton Act enforcement noted above, because it would ensure that "[t]he successful competitor, having been urged to compete, . . . [is] not . . . turned upon when he wins."<sup>259</sup> Secondly, the FTC is an expert agency with flexible fact-finding tools:

When the Commission was established in 1914, it was not intended to duplicate the functions of existing agencies, but rather to bring to bear on the problems of antitrust and unfair competition the "specialized knowledge and expert judgment, continuity of experience and political independence, flexible procedures and efficient fact-finding methods — [hopefully] characteristic of the administrative process."<sup>260</sup>

Given this unique ability, the FTC would be better suited than private plaintiffs or the Justice Department because it could fully investigate the effects of a monopolist's pricing without the procedural barriers of a Sherman Act lawsuit.<sup>261</sup> Furthermore, the Commission has the power to shape unique remedies tailored to the particular case.<sup>262</sup> This can include various forms of monetary relief, such as disgorgement for improperly obtained monopoly gains, restitution, and asset freezes.<sup>263</sup> These remedies could solve both concerns noted above;

256. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 550 (2007).

257. See *supra* notes 252–55 and accompanying text.

258. J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Welcoming Remarks, The FTC's Section 5 Hearings: New Standards for Unilateral Conduct? (Mar. 25, 2009), <http://www.ftc.gov/speeches/rosch/090325abaspring.pdf>; accord Hovenkamp, *supra* note 14, at 877.

259. *U.S. v. Aluminum Co. of Am. (Alcoa)*, 148 F.2d 416, 430 (2d Cir. 1945).

260. *FTC v. Dean Foods Co.*, 384 U.S. 597, 635 (1966) (Fortas, J., dissenting) (quoting Philip Elman, Comment, *Rulemaking Procedures in the FTC's Enforcement of the Merger Law*, 78 HARV. L. REV. 385, 387 (1964)) (addition by Justice Fortas).

261. See Sokol, *supra* note 20, at 1065–66.

262. See Hovenkamp, *supra* note 14, at 878.

263. *FTC v. Mylan Labs., Inc.*, 62 F. Supp. 2d 25, 36–37 (D.D.C. 1999).

they could restore the benefit consumers conferred on the monopolist and they could subsequently restore their ability to signal their true demand.

#### D. *The Ideal Rule*

Having analyzed in detail each element of the FTC's course of conduct rule, this Part briefly recaps how the Commission should limit the theory. First, in finding "actual harm," the FTC must show that the offending firm had market power. Second, as it seeks out "incipient harm," it does not necessarily need to show market power, but it does need to show that the conduct, if full-blown, would be a per se Sherman Act violation. A good example of this is the FTC's invitation-to-collude cases. Furthermore, in the incipency analysis, the Commission must avoid challenging conduct simply because it could lead to market power. The lawful pursuit of monopoly power is one of the prime goals of U.S. competition policy. For conduct that harms rivals, the FTC should avoid enforcing claims like interference with contract and misappropriation of trade secrets. However, it should intervene when the harm includes deception with market-wide effects. When the conduct is not covered by the Sherman Act or any other law, the FTC should intervene only when it shows (1) no other law applies, (2) harm to rivals, and (3) harm to competition, which is defined below.

With respect to conduct that would prevent future rivals from constraining monopoly power, the Commission must limit itself to conduct that is already unlawful. If the monopolist prevents rivals from competing with it through innovation and competitive pricing, it should not face sanctions. Given this limitation, however, the FTC would simply have the power enjoin illegal and anticompetitive conduct, which is an unnecessary redundancy for which other enforcement mechanisms exist, and therefore the Commission need not use this prong of the rule.

Additionally, harm to competition should not mean strictly consumer harm; it should mean harm to aggregate welfare such that market distortions suffice to show competitive harm. Finally, when the FTC must intervene through this framework, it must do so only under its standalone Section 5 authority because it must not allow private, follow-on treble damages. Also, the remedy must be carefully tailored to correct the market distortion. Throughout this analysis, however, the respondent has the opportunity to proffer procompetitive justifications for its conduct. Should those outweigh the competitive harms, the Commission must withdraw.

Thus, the Commission's power to combat certain anticompetitive conduct under its standalone Section 5 power can be properly limited and it can serve a socially beneficial purpose. Content and meaning can exist in its course of conduct theory. These limitations can provide certainty to businesses and correct potential market distortions that prevent the optimal flow of scarce resources.

## V. CONCLUSION

Despite the criticisms levied against the FTC and its amorphous power under Section 5, the Commission can correct significant market distortions through limited intervention. Its flexible fact-finding and remedy-fixing abilities, along with its preclusion of follow-on treble damages make it the ideal enforcer for certain types of conduct. Some of this conduct may have indeed existed in Intel's case, but, unfortunately, the materials in the Intel Docket do not provide the detailed legal analysis that would make future FTC intervention predictable. At the very least, the complaint against Intel gives firms factual notice as to the types of conduct that may catch the Commission's attention.

Additionally, the Complaint serves as a helpful vehicle from which to analyze the proper role of the FTC in shaping the incentives and disincentives of competition policy in the United States. The "course of conduct" theory that seems to drive the Commission's complaint against Intel has some powerful justifications. Some incipient conduct deserves an immediate sanction, such as inviting others to collude, and the FTC's flexibility in enjoining firms without market power here is necessary to accomplish this goal. Some deception affects more than just the wronged firm; it can have market-wide affects. This was indeed one of the Commission's allegations against Intel in the deceptive software design portion of the Complaint.

Still more conduct falls under neither the Sherman Act nor any other common law, but has potential anticompetitive effect, such as that involved in the *N-Data* case. This conduct cannot go unchecked, and the FTC's flexible fact-finding ability may be well suited to investigating such conduct's implications on competition.

Finally, the appropriate measure of anticompetitive effect for the FTC is the aggregate welfare standard. The standard would consider any market distortion to be sufficiently damaging to warrant investigation, but it would not be so quick to conclude that monopoly price alone is sufficiently harmful, because such pricing can, in the long run, be socially beneficial. As it engages this analysis, the Commission would recognize the value of competition to become a monopolist, it would recognize a monopolist's central role in spurring and perpetuat-

ing innovation, and it would ensure that “[t]he successful competitor, having been urged to compete, . . . [is] not . . . turned upon when he wins.”<sup>264</sup>

A carefully calibrated set of limitations, however, must surround the FTC’s broad grant of power under Section 5. The Commission must recognize that competitive harm can only exist when a firm has market power. It must also only examine incipient conduct that has tried-and-true anticompetitive effects under the Sherman Act. The FTC should not enforce common law norms that already have in place the proper incentives and remedies for purposes of competition law. The Commission must also avoid confusing a monopolist’s innovation and competitive pricing with conduct that is anticompetitive, because these actions are socially beneficial.

While this analysis embraces the monopolist as a socially desirable means of encouraging competition and innovation, it cannot go unchecked. Monopoly pricing is the reward that attracts such innovation, but it is also the culprit in some undesirable market distortions. In the presence of such distortions, the FTC’s standalone Section 5 enforcement is better than Sherman and Clayton Act enforcement. It can tailor unique remedies necessary for the situation and it can avoid the double bind problem that the Sherman Act creates when it encourages the pursuit of monopoly on one hand but imposes treble damages for monopoly pricing on the other.

The Commission, established to address problems of antitrust and unfair competition with “specialized knowledge and expert judgment, continuity of experience and political independence, flexible procedures and efficient fact-finding methods,”<sup>265</sup> can be part of a well-adjusted enforcement regime. To bring about this ideal, it must be clear, as Chairman Leibowitz has said, “about the rules of the road going forward.”<sup>266</sup> This paper has followed the current policy goal of U.S. competition law—efficiency—to outline the potential limits of those rules.

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264. *U.S. v. Aluminum Co. of Am. (Alcoa)*, 148 F.2d 416, 430 (2d Cir. 1945).

265. Elman, *supra* note 260.

266. Jon Leibowitz, Chairman, Fed. Trade Comm’n, Press Release, FTC Settles Charges of Anticompetitive Conduct Against Intel (Aug. 4, 2010) *available at* <http://www.ftc.gov/opa/2010/08/intel.shtm>.

